No. 17-333

In The Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE COUNTY OF SANTA CLARA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local

[1] Appellants and appellees have consented to the filing of this brief through blanket consent. Pursuant to this Court's Rule 37.6, counsel represent that no part of this brief was authored by counsel for any party, and no person or entity other than *pro bono* counsel made any monetary contribution to the preparation or submission of the brief.

government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, to champion the development of fair and realistic legal solutions, and to assist members on the vast and cutting-edge legal issues facing local government lawyers today. The IMLA provides the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization whose 11,000 members serve as appointed chief executives and assistants for cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional

management of local governments throughout the world.

The County of Santa Clara ("County"), established in 1850, is a charter county and political subdivision of the State of California. Its mission is to protect the health, safety, and welfare of 1.9 million County residents. As a governmental entity with a responsibility to protect the welfare of its residents, the County has a strong interest in promoting and protecting core democratic principles at the local, state, and national levels. The County also administers local, state, and federal elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Because the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," this Court has held that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Reynolds v. Sims*, 377 U.S. 533, 555, 560 (1964) (quoting *Wesberry*, 376 U.S. at 17-18).

Indeed, almost immediately after establishing the "one-person one-vote" doctrine, the Court recognized that this vital principle might apply with equal force to redistricting schemes that "designedly . . . would operate to minimize . . . the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). For "[t]he question of the gerrymander is the other half of *Reynolds v. Sims*." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part). "[T]he astute drawing of district lines [can] make[] [a] district either heavily Democratic or heavily Republican . . . . Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be." *Id.* at 176-77. As Justice Douglas observed: "The problem of the gerrymander is how to defeat or circumvent the

sentiments of the community. The problem of the law is how to prevent it." *Id.* at 177.

Amici represent local communities—cities, counties, and towns—across the United States. Such localities and municipalities play an essential part in our civic society, our democratic system, our constitutional order, and in the formation of distinct communities of interest. These communities are as diverse and unique as they are integral to the life, liberty, and happiness of a pluralistic, self-governing people.

Partisan gerrymandering "defeat[s] [and] circumvent[s] the sentiments" of these communities, *id.*, carving up localities and cobbling together bits and pieces of neighborhoods for no legitimate government purpose. Even when mapmakers manage to keep some municipalities intact, however, it is "the will of the cartographers rather than the will of the people [that] govern[s]." *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting). Studies have confirmed the unfortunate truth that voters recognized long ago: those who hold the districting pen can foreordain the composition and character of a state's congressional delegation without changing the mind of a single voter.

When the state targets certain segments of the population and suppresses their electoral influence because it disfavors their political beliefs and fears the way they will vote, it denies those voters meaningful representation and leads elected officials to ignore the distinct interests of localities as coherent communities. This is the polar opposite of what this Court has recognized as "[t]he very essence of districting": "to produce a different—a more

'politically fair'—result than would be reached with elections as large." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). The fact that the redistricting process is committed to political actors, permits the use of political considerations for legitimate purposes, and "inevitably has and is intended to have political consequences" does not mean that "racial or political groups [may be] fenced out of the political process [or have] their voting strength invidiously minimized." *Id.* at 753-54.

Although this Court has acknowledged that partisan gerrymanders "are incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and has suggested that partisan gerrymandering is not immune to judicial scrutiny, *see Hunt v. Cromartie*, 526 U.S. 541, 551 n.7 (1999) ("This Court has recognized . . . that political gerrymandering claims are justiciable."), it has declined—for decades—to articulate "the standards that would govern such a claim," *id.* This status quo cannot persist. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design.").

In the absence of any judicial remedy, legislators have grown bolder and more brazen in their abuses. This legal "no man's land" not only undermines the

rule of law in general, it also spills over into adjacent areas of the law, complicating redistricting doctrine for local government lawyers everywhere. Because many local governments *also* utilize single-member districts, this ambiguity makes it more difficult than necessary to identify the clear "dos and don'ts" of the redistricting process.

Happily, the Constitution already provides well-worn and intuitive standards that are familiar to cities, counties, and citizens alike. Whether the Court decides to ground partisan gerrymandering claims in the First Amendment, the Equal Protection Clause, or both, everyone readily understands that the Constitution prohibits the government from infringing the right to vote, from singling out citizens for disfavor based on their views, or from enacting laws that target particular groups of citizens for no reason other than disapproving their political beliefs.

Voters understand these principles innately, and attorneys navigate these legal doctrines fluently. By harmonizing the legal standards and evidentiary rules at issue in partisan gerrymandering cases with those found in the rest of redistricting jurisprudence, this Court can provide doctrinal consistency and practical tools to local government lawyers everywhere ahead of the next round of redistricting. The result will be less legal confusion, more compliant maps, and more responsive and accountable representation for voters and local communities across the country.

For these reasons, *amici* respectfully request that this Court vacate the order below and remand the case for further proceedings.

ARGUMENT

I. LOCAL GOVERNMENTS PLAY A VITAL ROLE IN OUR CONSTITUTIONAL ORDER AND IN CREATING DISTINCT COMMUNITIES OF INTEREST

This Court has long recognized the critical importance of political power being exercised at the local level—that is, the level closest to those governed. *See, e.g., Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968). Indeed, this Court recently stated in the federalism context that preserving a space for more local governance "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive' by putting the States in competition for a mobile citizenry.'" *Ariz. State Legis.*, 135 S. Ct. at 2673 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

Each of these enduring and essential aspects of governance aptly applies to our nation's great cities, small towns, rural counties, and the rest of the panoply of local governments in our federal system. This makes the views and vitality of local governments especially significant and relevant to the instant case.

To begin, local governments have a distinct ability to reflect the particular needs and interests of diverse communities across the country. As Justice Brandeis famously argued, decentralization can foster innovation in policymaking. *See New State Ice*

Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Given the fifty states' ability to serve as "laboratories of democracy," the thousands of cities and counties throughout the nation are by sheer quantity even better positioned to innovate with respect to policy in all sorts of substantive areas. Whether tackling public health challenges, advancing economic development, developing novel strategies for environmental protection, grappling with the challenges of public safety, or addressing so many other policy challenges, our cities, towns, and counties have been true laboratories of democracy, with innovations at the local level often later being adopted by states and the national government when they have succeeded (and cabined when they fail). *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219 (2014) (discussing dynamics of local innovation and policy diffusion) [hereinafter, Diller, *Why Innovate?*]. Ensuring that all three levels of governance are empowered in our federal system is vitally important. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 538 (1995) ("A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states

fail to deal with an issue, federal or local action is possible.").

In addition to their ability to serve as crucial laboratories of government innovation, municipalities also offer uniquely democratic benefits of participation. From the original New England town meetings of the founding generation—a tradition that still endures—to communities across the country today, opportunities for participation and interaction with local officials abound at the local level in ways that simply are not possible for ordinary citizens at the state and federal levels. *See* 1 Alexis de Tocqueville, Democracy in America 174 (H. Reeve trans. 1961) ("It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies."). In part, this is because there generally are far fewer constituents for each elected official even in our largest global cities, compared to that of state and national politics. Diller, *Why Innovate?*, *supra*, at 1257-58. These representation ratios allow local leaders to respond more directly to the people who elect them.

Local governments enhance democracy in another related sense, as Alexis de Tocqueville highlighted when he noted that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." De Tocqueville, *supra*, at 76. Service on one of our nation's countless city councils, school boards, county commissions, and myriad other local bodies provides an invaluable training ground for public leaders. Eventual leaders in our state and national governments often learn

their earliest lessons in the crucible of local government.

In addition, a certain amount of healthy competition among cities promotes efficiency and accountability in governance. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L.J. 72, 97 (2005) (reviewing empirical evidence that "migration patterns between city and suburbs are significantly affected by tax levels and investment in education"). Decentralization has some logic at the scale of the fifty states, but our nation's cities, towns, and counties have much greater ability to craft policies to respond to the preferences of mobile residents.

For these reasons and more, the boundaries of political subdivisions, such as counties and cities, are also a key consideration during the redistricting process. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services." *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring). Respect for locality boundaries can improve civic engagement, responsiveness, accountability, and avoid confusion for voters, candidates, and election administrators alike. *See id.* ("[D]istricts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters."). As Justice Powell once wrote:

> Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in

> if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting. It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Id. at 787 n.3 (Powell, J., dissenting) (internal quotations and citations omitted).

Because localities form a natural "community of interest" with common values and concerns that run deeper than party label, they often bring tailored, apolitical solutions to local policy problems. And just as this Court has rightly associated the decentralization and devolution found in our federal system with unique benefits, so too does empowerment of and respect for localities enhance and improve our democracy.

II. PARTISAN GERRYMANDERING DISRUPTS THE REPRESENTATION OF COMMUNITIES AND STIFLES LOCAL DECISION-MAKING

While local governments facilitate civic engagement, responsiveness, accountability, pluralism, local autonomy, and liberty, partisan gerrymandering undermines these critical democratic values.

1. Gerrymandering regularly tears coherent communities of interest apart and strings dissimilar communities together. When a congressional district is "nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State," *id.* at 787,

representatives are less attuned to the unique interests of local communities and those communities are less capable of coherently conveying local sentiments "up the chain" to their federal representatives, *see, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 537-38 (E.D. Va. 2015), *affirmed in part and vacated in part*, 137 S. Ct. 788 (2017) (noting that "the splitting of municipal and county jurisdictions drew the ire of citizens, who . . . pointed out the difficulties that citizens have in knowing who to contact, who to hold accountable, and who among several legislators should coordinate or lead the representation of local city and county interests").

The Court has previously recognized that gerrymanders that "exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines" can "cause[] a severe disruption of traditional forms of political activity." *Bush v. Vera*, 517 U.S. 952, 974 (1996) (O'Connor, J.). In *Vera*, for example, "[c]ampaigners seeking to visit constituents 'had to carry a map to identify the district lines, because so often the borders would move from block to block'; voters 'did not know the candidates running for office' because they did not know which district they lived in." *Id.*

Here, as in *Vera*, the gerrymander at issue dismembers several communities of interest, splitting "two of the three incorporated cities and one of the four incorporated towns" as well as dramatically increasing the number of splits in unincorporated (but officially recognized) communities. J.A. 808 ¶¶ 141, 142. And here, also as in *Vera*, the detrimental political impact is the same, with one of the plaintiffs

testifying that voters in the former Sixth District stopped voting after the redistricting because "they were confused about the candidates [and] didn't know who they should be engaging." J.A. 328.

2. Even when mapmakers manage to respect municipal boundaries, partisan gerrymandering can still inflict harm upon local policies, interests, and decision-making. This is because the combination of political polarization and partisan gerrymandering restricts the space for pragmatic community compromises and interferes with the representation of localities—with their distinct sets of preferences—as a whole.

Polarization "means that representatives in Congress nearly always vote the party line." Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, Expert Report in *League of Women Voters of Pa.*, et al., *v. Commonwealth of Pennsylvania*, No. 261 MD 2017, 15-16 (Pa. Commw. Ct. Nov. 27, 2017). As this has become more common, studies have shown an increasingly "muted responsiveness to localities" among representatives. *Id.* (citing Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 Am. J. of Pol. Sci. 136 (2001)). As a result, "polarization exacerbates the effects of gerrymandering on the political process." *Id.* at 16 n.10.[1]

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[1] Although polarization compounds the harms of gerrymandering, "[t]he consensus among Political Scientists

In other words, the offense of partisan gerrymandering is about more than "bloodless concepts like seat and vote shares;" it's about "distort[ion] of legislative representation—the beating heart of a democracy." Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. (forthcoming 2018) (manuscript at 2, available at https://ssrn.com/abstract=2990638). For example, at the state house level, "a one standard deviation pro-Democratic (pro-Republican) shift in the efficiency gap also pushed a state's overall set of policies by 2.4 percentage points in a liberal (conservative) direction. By comparison, *this is about twice the impact of switching the governor from one party to the other.*" *Id.* at 8 (emphasis added). At the congressional level, a 10% pro-Republican shift in the efficiency gap is associated with a shift in ideological alignment "roughly equivalent to the difference between the ideologies of Republican Senators John Cornyn and Lindsey Graham."[2] Warshaw, *supra*, at 22-23.

In short, mapmakers who engage in partisan gerrymandering possess the ability to swing the ideology of a state's congressional delegation dramatically—*all without changing the mind of a*

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using pre-2011 redistricting period data is that gerrymandering did not cause th[e] [rise in] polarization [since 1970]. There is not yet a consensus about the effect of redistricting on polarization in recent years." Warshaw, *supra*, at 16 n.10.

[2] "Cornyn was rated as the second most conservative senator by the nonpartisan National Journal in 2011-12 . . . . In contrast, Graham often takes moderate positions." Warshaw, *supra*, at 23.

single voter. Stephanopoulos, *supra*, at 3. And because representatives increasingly vote the party line based on national issues rather than local concerns, citizens who are invidiously targeted by partisan gerrymanders "are artificially deprived of the opportunity to . . . have their views represented in Congress." Warshaw, *supra*, at 15. This has a profound impact on nuanced, local issues and whether voters who belong to distinct communities of interest have any voice *as a member of that local community of interest*.

First-hand testimony from voters in numerous gerrymandering cases bears out the above empirical results. As one of the plaintiffs in this case testified, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time . . . they just feel disenfranchised that they can't, they don't have somebody that represents them anymore." J.A. 306-307. Voters in North Carolina have had a similar experience, declining to come out to vote because "they felt their vote didn't count." *Common Cause v. Rucho*, 1:16-CV-1026, 2018 U.S. Dist. LEXIS 5191, at *220 (M.D.N.C. Jan. 9, 2018). Whether one is a Maryland Republican or a North Carolina Democrat, gerrymandering strips disfavored voters of the opportunity to have their unique voice heard in the halls of Congress.

The diminished responsiveness of representatives to the *entirety* of their constituencies—and to their various local concerns—is not simply troubling as a matter of structural principles, institutional stability, and enduring constitutional values; it is also relevant as a matter

of redistricting jurisprudence. One repeated concern of the Court has been accepting—*without any evidence*—the notion that representatives will not be responsive to the needs of their constituencies as whole. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("An individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters."); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 469-70 (2006) (Stevens, J., dissenting) ("[T]his Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.").

As partisan gerrymandering cases continue to show, the overwhelming statistical and testimonial evidence proves that districts are concocted so as to insulate representatives and ensure that they need not give any weight to the subset of voters who have been precisely and reliably stripped of any meaningful electoral power. Thus, even when local municipal boundaries are not breached, partisan gerrymandering robs county and city constituencies of the opportunity to have their unique and diverse

perspectives heard and dampens congressional concern for local community interests.[3]

In short, partisan gerrymandering frustrates the preservation of local government interests, restricts the freedom of local governments to pursue policies suited to their constituents, and impedes the ability of voters who belong to distinct communities of interest to have their views heard in Washington.

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[3] This disconnect also manifests in the policies enacted at the state and federal level, with local prerogatives increasingly steamrolled by legislators more focused on advancing a single ideology than providing space for constituents with diverse views to enact locally tailored solutions based on the needs of the community. For instance, in *Gill v. Whitford*, several *amici* provided examples of the growing number of local policies being preempted by state legislatures in states with high efficiency gaps and other indicia of partisan gerrymandering. *See generally* Brief *Amici Curiae* of International Municipal Lawyers Association, *et al.*, *Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017).

Because gerrymandering "dramatically influences the representational distortion of House delegations," Stephanopoulos, *supra*, at 19, and polarization continues to grow, local concerns have increasingly fallen by the wayside on Capitol Hill as well, *see* J.B. Wogan, *States and Localities are Losing Their Influence in Washington*, Governing (June 2014), available at http://www.governing.com/topics/politics/gov-states-localities-losing-influence.html (last accessed Jan. 28, 2018). Because Congress and state legislatures alike wield the power to override, curtail, or disregard the policies and positions of municipalities across the country, these bodies must possess the utmost democratic and constitutional legitimacy if their intrusions on local autonomy and policymaking are to be justified.

III. *AMICI* SUPPORT A CLEAR AND COHERENT APPROACH TO REDISTRICTING LAW THAT COMBINES INTUITIVE STANDARDS WITH PRACTICAL EVIDENCE

As organizations representing local governments and local government lawyers, *amici* recognize the need for—and advocate for—realistic legal solutions to complex legal problems. Here, too, *amici* believe that the present case—and other pending partisan gerrymandering claims—offer an opportunity for this Court to clarify the state of the law, apply well-established legal standards, and provide workable evidentiary guidance to courts and lawyers across the country ahead of the next major round of redistricting in 2021.

A. The Ambiguous Treatment of Partisan Gerrymandering Claims Complicates Redistricting Law for Local Governments

Although many redistricting cases and analyses focus on state legislative and congressional representation, local governments (and local government lawyers) must also navigate the various strands of this Court's redistricting case law. From one-person one-vote cases to racial dilution and racial sorting cases, localities often deal with cutting-edge legal questions before claims are brought on a wider basis.[4] In fact, challenges raised to city and county

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[4] *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (one-person one-vote case regarding population deviations based on illegitimate consideration of partisan advantage); *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019 (9th Cir. 2016) (equal

redistricting decisions are especially useful to the development of redistricting case law because they are some of the few challenges that are routed through the U.S. Courts of Appeals and subject to this Court's discretionary jurisdiction. *See* 28 U.S.C. § 2284(a) (convening three-judge district courts "when an action is filed challenging the constitutionality of the apportionment of *congressional districts* or the apportionment of any *statewide* legislative body") (emphasis added).[5]

And while redistricting law has a notorious reputation for being complex,[6] a great deal of the

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protection and *Anderson-Burdick* case regarding city's hybrid city council system utilizing ward-level primaries and at-large general election); *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011) (one-person one-vote case regarding use of citizen-voting-age population versus total population); *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002) (racial gerrymandering case); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (racial gerrymandering case regarding whether districts' shapes and demographics provide adequate circumstantial evidence to prevent summary judgment); *Calvin v. Jefferson Cnty. Bd. of Cmm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) (one-person one-vote case regarding use of prison populations in calculating equal population).

[5] *See, e.g.*, *Public Integrity Alliance*, 836 F.3d 1019 (9th Cir. 2016), *cert. denied*, 197 L. Ed. 2d 518 (2017); *Lepak*, 453 F. App'x 522 (5th Cir. 2011), *cert. denied*, 569 U.S. 904 (2013); *Chen*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

[6] Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization In Redistricting and Voting Cases*, 59 Wm. & Mary L. Rev. (forthcoming 2018) (manuscript at 12, available at https://ssrn.com/abstract=2912403) ("The most charitable thing

complexity is due to this Court's ambiguous treatment of prior partisan gerrymandering claims. Because the lack of a claim leaves open conceptual and doctrinal gaps in racial gerrymandering law and the one-person one-vote doctrine, mapmakers and litigants alike "engage in legal arbitrage," distorting the body of law that does exist by using it to fight about conduct governed by a body of law that does not exist. *See* G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 Cardozo L. Rev. de novo 155, 168.

> After the last census, for example, legislators sorted voters by race under the pretext of a constitutional purpose (preventing racial vote dilution) to achieve an arguably unconstitutional purpose (partisan vote dilution). By doing so, legislators could pursue suppressive partisan goals and blame the federal courts and federal executive to boot. In response, some partisan litigants brought racial sorting claims to vindicate partisan dilution harms, using the legal remedy that did exist as a proxy for the legal remedy that did not. Legislators then claimed in defense that they were discriminating against voters based on party for partisan purposes (unconstitutional under law that does not exist) rather than discriminating

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to say about the current state of racial gerrymandering law is that it is a big mess.").

> against voters based on race for partisan purposes (unconstitutional under law that does exist).

Id. Even if the Court were to deviate from its default rule that redistricting laws are justiciable, *Baker v. Carr*, 369 U.S. 186 (1962), by creating an unparalleled non-justiciability exception for partisan gerrymandering claims,[7] this doctrinal vacuum would remain wide open, leaving mapmakers and litigants to "shadow-box" over the real issues at stake, *see* Hasen, *supra*, at 34.

In short, the law's internal inconsistency, ambiguity, and incompleteness provides the greatest headache to local government lawyers faced with the task of advising clients on the "dos and don'ts" of redistricting law, not the flexibility of any particular "do" or the rigorousness of any specific "don't."

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[7] As this Court pointed out in *Baker v. Carr*: "The doctrine . . . is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." 369 U.S. at 217. Creating a new justiciability exception for partisan gerrymandering claims on the basis of unmanageability alone would be profoundly troubling. Not only has this Court already acknowledged that partisan gerrymandering is contrary to fundamental democratic principles, *see Ariz. State Legislature*, 135 S. Ct. at 2658, no "majority of the Supreme Court has *[]ever* found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim," *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *70 n.14. Where, as here, there are numerous ways of detecting the presence of meaningful, intentional vote dilution, *see infra* at 30-36, there is no basis to claim that the Court lacks all means of identifying the presence of a constitutional violation.

Crafting a claim (even a demanding one) that completes the redistricting-law picture would not add complexity, but rather would ease it.

Indeed, in areas of the law where "structural safeguards" and institutional boundaries are at issue, this Court has remarked that "clear distinctions" are preferable to "delphic alternative[s]," which "simply prolong[] doubt and multip[y] confrontation." *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-40 (1995). The Court's equivocal treatment of partisan gerrymandering over several decades has done precisely this, "blurr[ing] the lines of lawful behavior and draw[ing] legislators out beyond clear constitutional boundaries." Parsons, *supra*, at 159. As such, redistricting law would benefit from advice familiar to local government attorneys everywhere: "Good fences make good neighbors." *Plaut*, 514 U.S. at 240.

B. Constitutional Doctrine Already Provides Fair and Intuitive Standards Familiar to Local Government Lawyers

As a three-judge district court in North Carolina recently noted, partisan gerrymandering "violates a number of well-established constitutional standards—that the government act impartially, not infringe the right to vote, and not burden individuals based on the exercise of their rights to political speech and association." *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *87. Whether the Court looks to the Equal Protection Clause, the First Amendment, or both, the Constitution provides well-worn, intuitive standards that are familiar to local governments, local government attorneys, and the public.

Applying these principles to partisan gerrymandering is not an unnecessary extension of this Court's case law, but rather a long-overdue correction that harmonizes the Court's approach to partisan gerrymandering claims with the rest of its fundamental constitutional doctrines and its overall approach to judicial neutrality.[8] As Circuit Judge Niemeyer observed in his dissenting opinion below, "even where the government is allowed, or even required, to *consider* the viewpoint of expression that it regulates, this does not give it permission to *intentionally advance* one viewpoint over the other." *Benisek v. Lamone*, 1:13-CV-3233, 2017 U.S. Dist. LEXIS 136208, *74 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting) (citing *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982)).

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[8] *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017); Parsons, *supra*, at 167 (noting that "the Court's unusual treatment of partisan gerrymandering strays from [its traditional, established] approach to [judicial] neutrality"); *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *210-11 ("How can the First Amendment prohibit the government from disfavoring certain viewpoints, yet allow a legislature to enact a districting plan that disfavors supporters of a particular set of political beliefs? How can the First Amendment bar the government from disfavoring a class of speakers, but allow a districting plan to disfavor a class of voters? How can the First Amendment protect government employees' political speech rights, but stand idle when the government infringes on voters' political speech rights? And how can the First Amendment ensure that candidates ascribing to all manner of political beliefs have a reasonable opportunity to appear on the ballot, and yet allow a state electoral system to favor one set of political beliefs over others?").

First Amendment doctrine makes clear that the government cannot "single[] out a subset of messages for disfavor based on the views expressed," *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment), or enact laws that favor or disfavor a particular group or class of speakers, *see Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The Court does not uphold judicial independence and impartiality by steering clear of such cases, even when they involve political actors or political issues. Rather, the Court protects the Constitution and preserves its own public status by rigorously and consistently honoring these constitutional mandates.

Relying on such established principles would provide clear rules that are second-nature to local government attorneys, understandable to mapmakers, and obvious to the average citizen: "the government [cannot] discriminate between citizens based on how the government predict[s] they w[ill] vote [in order to] favor preordained candidates and . . . suppress the influence of those who disagree with the state-sanctioned choices."[9] Parsons, *supra*, at

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[9] As Chief Justice Roberts noted at oral argument in *Gill v. Whitford*, any decision provided by the Court must be intuitive and sound in clear constitutional principles, lest the "intelligent man on the street" doubt the explanation, thereby risking damage to the "status and integrity" of the Court. *See Gill v. Whitford*, 16-1161, Oral Arg. Tr. 37:11-38:4 (Oct. 3, 2017). "Far from diminishing the Court's credibility," however, a decision restricting partisan gerrymandering is more likely to be received by the public like the Court's celebrated one-person one-vote doctrine—"a rule so obvious one wonders why it took so long to arrive." Parsons, *supra*, at 176.

176. In short, mapmakers cannot draw districts in order to favor Republicans simply because the mapmaker "think[s] electing Republicans is better than electing Democrats," *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *5, or "set out to draw . . . borders in a way that [is] favorable to the Democratic Party" simply because the mapmaker would like to see more Democrats elected, *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *52. "[T]hat is not a choice the Constitution allows . . . mapdrawers to make." *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *6.[10]

Nor are any of the nuances of these traditional constitutional concepts difficult to understand. Just as political affiliation can be considered in hiring for *policy-level* government jobs (where the government has a legitimate interest), but not in hiring for *non-policy-level* government jobs (where it does not), *see Vieth*, 541 U.S. at 294 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)), so too can political affiliation be used to advance legitimate redistricting goals (such as consistently creating competitive districts[11] or

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[10] *See also* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. (forthcoming 2018) (available at https://ssrn.com/abstract=3011062); Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, *supra*; G. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional*, 24 Wm. & Mary Bill Rts. J. 1107 (2016).

[11] Appellees in the instant case have argued that altering Maryland's Sixth District created a "newly competitive" district. Mot. to Affirm, *Benisek v. Lamone*, 17-333, at 18 (filed Oct. 31, 2017). But this Court has frequently reminded redistricting litigants that even *legitimate* redistricting policies cannot

"allocat[ing] seats proportionately," *Vera*, 517 U.S. at 964-65 (O'Connor, J.) (citing *Gaffney*, 412 U.S. at 751-54)) but not illegitimate redistricting goals (such as partisan advantage, *see Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective")).

Similarly, as in other areas of the law, even consideration of political affiliation in illegitimate situations will not give rise to liability when the consideration is not causally related to the government action, the government action would have occurred regardless, or the impact is *de minimis*. *See Benisek*, 2017 U.S. Dist. LEXIS 136208, at *85 (Niemeyer, J., dissenting). These are well-known standards that local governments and

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survive when they are applied inconsistently or in a discriminatory fashion. *See Brown v. Thomson*, 462 U.S. 835, 844 (1983) (noting that the population variations were "entirely the result of the consistent and nondiscriminatory application of a legitimate state policy"); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.") (internal citation omitted); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (permitting population deviations "only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination").

local government lawyers throughout the country encounter and incorporate into their policy- and decision-making *every day* across a range of contexts.

While *amici* acknowledge that recognizing such a claim might lead to a short-term uptick in the number of partisan gerrymandering actions faced by some localities, this occurs when *any* confusing and unsettled body of law is clarified by the Court. When one considers "the timeline of the law," *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring), the relevant question is not how many maps are challenged at the moment the rule of law is announced, but what equilibrium arises once the rule of law is settled. *See* Parsons, *supra*, at 176. This perspective is especially critical here, where multiple decades of judicial abstention have encouraged mapmakers to venture well beyond normal constitutional boundaries, even to the point of freely conceding that maps were enacted to reap a partisan advantage. *See Benisek*, 2017 U.S. Dist. LEXIS 136208, at *52 (conceding that mapmakers "set out to draw the borders in a way that was favorable to the Democratic Party"); *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *148 (enacting formal criteria that the plan should aim to elect "10 Republicans and 3 Democrats" because committee co-chair "did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats") (internal brackets omitted).

Considering *every* map in the United States—congressional, state, and local—will be revisited following the upcoming 2020 census with or without this Court's guidance, *amici* believe clarification by the Court would substantially benefit those tasked with drawing new maps following the census and

would obviate the need for litigation that localities might otherwise face in future years based on the current amorphous state of the law. With a coherent political gerrymandering claim (or claims) in place, mapmakers will better understand what practices are and are not permissible and local government lawyers will better understand how the various strands of this Court's redistricting jurisprudence interact with one another so as to minimize or eliminate the risk of a lawsuit—political, racial, or otherwise.[12]

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[12] *Amici* also believe this new equilibrium is likely to enhance the stability and status of our democratic institutions across the board. In 1973, 42% of Americans had a "great deal" or "quite a lot" of confidence in Congress, while only 14% had "very little" or "none." In 2017, only 12% expressed confidence in Congress, whereas 47% had little to none. *Confidence in Institutions*, Gallup, http://www.gallup.com/poll/1597/confidence-institutions.aspx (last accessed Jan. 28, 2018). In a 2016 poll, 40% of Americans responded "I have lost faith in U.S. democracy," and 6% said "I have never had faith in U.S. democracy." Nathaniel Persily & Jon Cohen, *Americans Are Losing Faith in Democracy—And in Each Other*, The Washington Post (Oct. 14, 2016), https://www.washingtonpost.com/opinions/americans-are-losing-faith-indemocracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.9ea890ecac75 (last accessed Jan. 28, 2018).

Other studies have demonstrated that voters are less likely to trust representatives in Congress when they hail from a state that has been gerrymandered to suppress their views. *See* Warshaw, *supra* at 28. "This suggests that gerrymandering is eroding Americans' faith in our democracy." *Id.*

C. Permitting a Variety of Realistic and Practical Evidence Would Improve Administrability

Given the variety of contexts in which a partisan gerrymandering claim could arise, *amici* also urge the Court to employ a consistent evidentiary approach to such claims and permit both plaintiffs and defendants to rely upon a wide variety of realistic and practical evidence in bringing and defending claims. This Court held last term in *Cooper v. Harris* that a racial gerrymandering claim rests upon fundamental constitutional standards, and while certain types of evidence (such as an alternative map) may be particularly persuasive or useful in supporting such a claim, the Equal Protection Clause does not demand any "special evidentiary prerequisite." 137 S. Ct. 1455, 1479-80 (2017). This should be the case in the partisan gerrymandering context as well.

Expert evidence, for example, should be permitted— where available and accessible—in order to maintain or defend a claim. Expert evidence will often be the best evidence available in the pursuit or defense of a partisan gerrymandering claim.[13] Such

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[13] *See Rucho*, 2018 U.S. Dist. LEXIS 5191, at *166-88 (relying on measures of asymmetry, including the efficiency gap, mean-median difference, and partisan bias in finding discriminatory effect); *id.* at 188-91 (relying on an "extreme statistical outlier" analysis and noting that 94.5% of simulated plans across twenty races would have elected two-to-four fewer Republicans than the enacted plan, and 100% of simulated plans would have elected at least one less Republican); Mem. in Supp. of Def.'s Cross-Mot. for Summ. Judgment, *Benisek v.*

evidence has not flummoxed lawyers or judges in racial dilution cases, racial sorting cases, or any other number of cases in which such evidence is deployed. *See Rucho*, 2018 U.S. Dist. LEXIS 5191, at *87-102 (citing examples of judicial reliance on statistical and social science evidence as proof of a violation of a constitutional standard).

That said, as Appellants advocate, such studies should not be mandatory, either as a threshold showing or as a defensive necessity. From a practical perspective, many local governments might not wish to spend resources on expert evidence if they believe other evidence is available and sufficient to defeat a partisan gerrymandering claim.

Moreover, certain analytical tools might not produce reliable results when applied to local governments. For example, "when a [political body] has six or fewer representatives, the efficiency gap varies substantially with the shift of a single seat, thus making it a less useful metric." *Id.* at *169 n.27. This would "render[] it difficult, if not impossible, to apply" in certain localities with only a handful of districts. *Id.* at *174.

In the end, however, the *constitutional standard* does not vary with the size of the city or county council, just as "[the] constitutional standard does not vary with the size of a state's congressional delegation." *Id.* at *175. In smaller city or county councils, just as "[i]n states entitled to a small

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Lamone, 1:13-CV-3233, Dkt. No. 186-1, at 24, 37-38 (filed June 30, 2017) (D. Md.) (invoking efficiency-gap calculations as a defense against a claim of partisan gerrymandering).

number of representatives [in Congress], a partisan gerrymandering plaintiff simply will have to rely on different types of *evidence* to prove that the redistricting body violated th[e] constitutional standard." *Id.*

The case at bar is such a case, with Appellants relying upon election results, the Democratic Performance Index (DPI), and the Cook Partisan Voting Index (PVI) to provide evidence "that their electoral effectiveness was meaningfully burdened." *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *85 (Niemeyer, J., dissenting). As Judge Niemeyer observed, such analyses are sophisticated and dependable tools in their own right, regularly used by election analysts and mapmakers themselves. *See id.* at *79-80 (noting that the DPI metric was used by the consultant that designed Maryland's plan); *id.* at *64-65 (noting that the PVI metric is a "well-respected" measure, and observing that "[w]hen the Cook Report has rated a district 'Solid Republican' on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; when a district has been rated as 'Likely Democratic,' the Democratic candidate has won 94% of the time") (citing James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010)).

Independent, nonpartisan organizations have relied on similar kinds of modeling to predict election outcomes. For example, FairVote predicted the outcome in 361 of 435 congressional seats ahead of the 2016 election with 100% accuracy using no

information other than 2010-2014 election results and whether an incumbent was running in the race.[14] These projections were made in *November 2014—two years* before the election—and were only updated to account for races in which representatives announced they would not be seeking reelection in 2016.[15] "In these districts, the challengers [were] powerless to affect the outcome, regardless of their funding, their qualities as candidates, or their ability to motivate supporters."[16] Members of Congress elected from such "safe" seats (with a 10-percent advantage, for example) "need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities in their district." *LULAC*, 548 U.S. at 470–71 (Stevens, J., dissenting in part). *See also Rucho*, 2018 U.S. Dist. LEXIS 5191, at *164-65 (noting agreement by defendants' own expert that a seat was "'safe'—*i.e.*, highly unlikely to change parties in subsequent elections").

In other words, pretending that partisan gerrymanders are not readily identifiable or do not substantially impact the ability of targeted voters to meaningfully affect the political process would be a judicial fiction.

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[14] FairVote, *Monopoly Politics 2018*, at 2, available at https://fairvote.app.box.com/v/MonopolyPolitics2018 (last accessed Jan. 28, 2018) [hereinafter, "FairVote, *Monopoly Politics 2018*"].

[15] Andrew Douglas, *FairVote's Monopoly Politics 2016 Projections Updated*, FairVote (Sept. 22, 2015) http://www.fairvote.org/fairvote_s_monopoly_politics_2016_projections_updated (last accessed Jan. 28, 2018).

[16] FairVote, *Monopoly Politics 2018*, *supra*, at 2.

Election results themselves can also offer accessible, circumstantial evidence that an intended harm was, in fact, achieved. *See id.* at *162 (including election results among "categories of evidence" used to prove that the challenged plan diluted the votes of targeted voters); *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *84 (Niemeyer, J., dissenting) (noting that a change in election results "would certainly be relevant evidence"). Although the weight of election results evidence will vary based on the strength of the plaintiff's showing of intent and other evidence that might be available, that does not mean such evidence should be disregarded as a matter of law.

Nor is any particular election result—or any particular DPI or PVI showing—dispositive. If a representative resides in a district that is particularly favorable based on natural geography or other legitimate redistricting considerations, a partisan gerrymandering claim should not succeed. Similarly, the mere fact that one candidate wins and one candidate loses any given race does not, standing alone, prove or negate the existence of an invidious suppressive effect. *See id.* ("[A] plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election . . . ."). This is the same evidentiary approach local government attorneys encounter in the Court's racial dilution case law. *See Thornburg v. Gingles*, 478 U.S. 30, 57 (1986) (noting that the "loss of political power through vote dilution is distinct from the mere inability to win a particular election").

In other words, it simultaneously can be true that no voter possesses any right to live in any particular district or win any particular election, and that the same voter possesses the right not to have the electoral odds intentionally stacked against him or her in order to disfavor his or her political opinions, expressions, and associations. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting that the Constitution protects citizens "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights"); Kang, *supra*, at 383 ("Party members may not have any constitutional entitlement to electoral success, but they should have a constitutional expectation against the government actively trying to burden their representational interests based on their partisan affiliation and beliefs.").

Evidence need not prove impossibility (and, therefore, the ability to divine the future) in order to prove the existence of a meaningful burden. The evidence need only show that the gerrymander was intended to dilute the influence of the targeted voters and that the gerrymander's success is assured under any *likely* electoral scenario.[17] These elements can be proven through a range of different realistic and practical forms of evidence, and the Court should not

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[17] *See Whitford v. Gill*, 218 F. Supp. 3d 837, 898-910 (W.D. Wis. 2016), *appeal docketed*, No. 16-1161 (U.S. Mar. 24, 2017); *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *87-88; *Benisek*, 2017 U.S. Dist. LEXIS 136208, at *84-87 (Niemeyer, J., dissenting).

foreclose them just as it does not foreclose such evidence in other redistricting cases.[18]

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[18] *See LULAC*, 548 U.S. at 468 n.9 (Stevens, J., dissenting in part) (noting that the Court could "conclude that a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander"); *White v. Regester*, 412 U.S. 755, 769 (1973) (affirming district court judgment that, "[b]ased on the totality of circumstances, . . . [the plan] invidiously excluded [plaintiffs] from effective participation in political life"); *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *193 (holding that, "[w]hen viewed in totality," the expert evidence, election results, and other circumstantial evidence "prove that [the challenged plan] has discriminated, and will continue to discriminate, against [the targeted] voters").

The fact that the Court already allows defendants in racial sorting cases to rely upon a range of evidence to prove that politics, not race, predominated in the linedrawing process demonstrates that courts are more than capable of receiving and considering a host of different circumstantial and direct evidence in deciding whether the "essential basis" used in forming a district was racial or political. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Whether such political considerations are legitimate or illegitimate is a separate question for courts to evaluate. *Compare Easley v. Cromartie*, 532 U.S. 234, 239-47 (2001) (legitimate interest in a 6-6 "partisan balance"), *with Rucho*, 2018 U.S. Dist. LEXIS 5191, at *147-49 (illegitimate interest in pursuing a 10-3 "partisan advantage"). This question parallels that already ably managed in the racial gerrymandering context, where courts distinguish between legitimate and illegitimate racial considerations in redistricting. *Compare City of Rome v. United States*, 446 U.S. 156, 177 (1980), *abrogated in part by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (legitimate interest in preventing racial dilution and securing equal opportunity to elect), *with Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (illegitimate interest in racial maximization). *See also Gill v.*

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By adopting this realistic, practical, and consistent evidentiary approach and relying on well-established, familiar, and coherent constitutional standards, the Court can provide local governments and their lawyers a clear lay of the land heading into the next round of redistricting, forestall a range of racial and political gerrymandering claims that might otherwise arise, and help preserve the faith and voice of voters residing in distinct, local communities across the country.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court vacate the order below and remand the case for further proceedings.

Respectfully submitted,

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Whitford, 16-1161, Oral Arg. Tr. 7:8-9 (Oct. 3, 2017) (JUSTICE GINSBURG: "[Doesn't] max-Republican . . . have the same problem that 'max-Black' did?").